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Supreme Court of the United States.

OCTOBER TERM, 1974

NO. 74-213

WERNER C. VON CLEMM ET AL.,
PETITIONERS

v.

ROMANA ACOSTA BANUELOS,
TREASURER OF THE UNITED STATES, ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY BRIEF

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The Respondents assert in their November, 1974 *MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION* (p. 5):

> "That a Section 9 (a) suit affords a person constitutional protection is firmly established, *Societe Internationale* v. *Rogers*, 357 U.S. 197, 211, *Stoehr* v *Wallace*, 255 U.S. 239,245-246."

The *Stoehr* case dealt with the question of whether the government had the right to sequester property in the first place. The Supreme Court ruled that it did and that executive seizures under the Act without prior judicial determination were within the war powers of Congress, *provided "adequate provision be made for a return in case of mistake"*.

That, and that only, is the essence of the opinion of the Supreme Court of the United States in *Stoehr* v. *Wallace* (supra). Mr. Justice Van Devanter, in summing up the court's opinion at pages 245, 246, stated:

> "That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be *enemy-owned, if adequate provision be made for a return in case of mistake,* is not debatable. (Citations) There is no warrant for saying that. . . ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts, but it does not make his action final." (Emphasis ours.)

At page 243, the Justice, citing from section 7(c) of the Act, as amended November 4, 1918, stressed the *relief provisions* of the Act. He stated:

> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian. . . shall be that provided by the terms of this act. . . "
>
> "By section 12, as amended March 28, 1918, the Custodian is clothed with 'all of the powers of a common-law trustee' in respect of all enemy property coming into his hands and is given authority subject to the President's supervision, to manage and dispose of the same. . . as if he were the absolute owner. . . As respects the ultimate disposition of the property or its proceeds section 12 says: 'After the end of the war any claim. . . to. . . property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct.'"

At the time Mr. Justice Van Devanter rendered his decision in the Stoehr case, supra, *Section 32 had not yet been added to the Act.* Section 32 reinforces Petitioners' position in that it reaffirms the wording of Section 12, cited by Mr.

Justice Van Devanter (pp. 243-244):

> "After the end of the war any claim . . . to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."

Congress, to use the words of Mr. Justice Van Devanter, has made "adequate provision for a return in case of mistake". That fact was emphasized by Judge Lindley in *Kaku Nagano* v. *McGrath*, 187 F. 2d 759, where the Court said at p. 766:

> "The Supreme Court, itself, said in *Becker Steel Co.* v. *Cummings*, 296 U.S. 74, 79, 56 S. Ct. 18: 'The seizure and detention which the statute commands and the denial of any remedy except that afforded by section 9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the nonenemy owner either the return of his property or compensation for it.'"

The Supreme Court upheld Judge Lindley. It denied a writ of certiorari to the government.

The decision in the *Stoehr* case confirms that the Attorney General is under statutory and constitutional obligations to rule on the question of title.

In *Societe*, supra, the Supreme Court expressly held (p. 211):

> "Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned *is rescued from constitutional invalidity* under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act *which afford a nonenemy claimant a later judicial hearing as to the propriety of the seizure* (citations)." (Emphasis ours.)

It is clear that the "constitutional protection" to which Respondents refer concerns claimants' ultimate right to be heard "on the propriety of the seizure". The seizure, to be sure, was constitutional within the meaning of *Stoehr, supra*. The "propriety of the seizure" has, however, never

been determined in Petitioners' case. The District Court in *Von Clemm* v. *Smith*, 255 F. Supp. 353 (S.D. NY 1965) 255 F. Supp. 353 (S.D.N.Y. 1965) aff'd 363 F. 2d 19 (2d Cir. 1966), cert. den. 385 U.S. 975 (1966), did not reach the question of title. The Attorney General's obligations to rule on the question of title is also clearly expressed in *Subsection 10 of Executive Order 9095*, promulgated March 11, 1942, *7 F. R. 1971*, which states:

> "For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me (the President of the United States) by section 5(b) of the Trading With the Enemy Act, as amended."

The Respondents' memorandum (p. 2) states:

> "The district court. . . (found) that Von Clemm was an "enemy" within the purview of the Act."

The term "enemy" under the Act (§§ 2 and 9) applies to enemy nationals or enemy entities and to persons of whatever nationality, domiciled in enemy territory. The term does not apply to resident United States citizens. The term "enemy" includes:

> "individuals. . . as may be natives, citizens or subjects of any nation. . . with which the United States is at war, *other than citizens of the United States. . .* " (2c) (Emphasis ours).

The holding of Von Clemm v. Smith *supra* is that Von Clemm lacked standing to claim return under § 9 of the Act because Von Clemm, whom the court found to have been an agent of the German government prior to December 7, 1941, failed to prove that he had ceased to be such an agent after December 7, 1941. Failure to prove a "negative" (Opinion, p. 369) does not make a United States citizen an "enemy" under the Act. Therefore, the court in *Von Clemm* v. *Smith*, supra, failed to find that Von Clemm was in fact

an "enemy" within the meaning of the Act.

The court recognized that the term "enemy" could not be applied to a United States resident-citizen claimant prior to December 11, 1941. The court was careful in distinguishing between the term "agent" and "enemy". The Court of Appeals clearly draws the distinguishing line by stating in *Von Clemm* v *Smith*, 363 F. 2d 19 (2d Cir. 1966):

> ". . . all the parties recognize, it is Von Clemm's status *after* December 11, 1941. . . that determines whether he is an enemy." At p. 23 (Emphasis ours).

The Court of Appeals moreover found:

> "none of the evidence is conclusive. . . the only relevance of . . . events is insofar as they meet his (Von Clemm's) burden." *Ibid.*

The "burden of proof" question is the only one the Court of Appeals considered. The court did not consider the property rights of United States resident-citizen claimants under the Act, nor under the United States Constitution. The Court did not determine "enemy" or "non-enemy" ownership as required by *Stoehr v. Wallace*, supra. and *Societe Internationale v. Rogers*, supra. a requirement also clearly expressed in *Executive Order 9095*, supra.

The Government has conceded that the present § 32 action is a trial *de novo*. In a trial *de novo* "the most extensive judicial scrutiny includes determination of 'jurisdictional' or 'constitutional facts'" (Opinion of Court of Appeals, p. 6). The principal issue in the present action is petitioners' property rights, and the safeguards the law and the United States Constitution provide pertaining to such rights. At issue also is administrative discretion, and the constitutional restraint under which it must be exercised.

Respectfully submitted,

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